RECORD NUMBER: 17-1351

United States Court of Appeals
for the
Fourth Circuit

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,

Plaintiffs/Appellees,

– v. –

DONALD J. TRUMP, *et al.*,

Defendants/Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Case No. 8:17-cv-00361-TDC

BRIEF OF FORMER FEDERAL IMMIGRATION AND HOMELAND SECURITY OFFICIALS AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE, AND IN OPPOSITION TO DEFENDANTS-APPELLANTS' MOTION TO STAY

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INTEREST OF AMICI CURIAE[1]

Amici served in senior positions in the federal agencies charged with enforcement of U.S. immigration laws under both Democratic and Republican administrations.

- Roxana Bacon served as Chief Counsel of U.S. Citizenship and Immigration Services ("USCIS") from 2009 to 2011.
- Stephen H. Legomsky served as Chief Counsel of USCIS from 2011 to 2013 and as Senior Counselor to the Secretary of the U.S. Department of Homeland Security ("DHS") on immigration issues from July to October 2015.
- Paul Virtue served as General Counsel of the U.S. Immigration and Naturalization Service ("INS") from 1998 to 1999. INS is the predecessor agency to the federal offices within DHS that now have responsibility for enforcing the nation's immigration laws. He also served as Executive Associate Commissioner from 1997 until 1998 and Deputy General Counsel from 1988 until 1997.

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[1] Amici submit this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2) and state that all parties have consented to its timely filing. Amici further state, pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), that no counsel for a party authored this brief in whole or in part, and no person other than the amicus curiae or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

As former leaders of the nation's primary immigration enforcement agencies, amici are familiar with the historical underpinnings of the immigration laws' prohibition of national-origin discrimination. In amici's experience, adhering to these laws respects that history and serves our values; promotes counterterrorism goals by focusing threat evaluations on individual rather than group characteristics; and facilitates cooperation with both domestic Muslim communities and foreign government partners in majority-Muslim nations. Amici's experience demonstrates that suspending entry of all nationals from a group of such countries would undermine these goals by contravening long-settled laws against national-origin discrimination, substituting rote stereotyping for targeted assessment, and straining the United States' relationships with key allies.

Amici support the district court's preliminary-injunction order and urge this Court to deny the Government's motion to stay the order pending this appeal. Amici expect that the parties' briefs will thoroughly address the issues arising under the Establishment Clause, including whether the predominant purpose of the challenged Executive action is to disfavor Muslims. Amici therefore focus on two other issues: (i) the history, meaning, and effect of the immigration laws' prohibition on national-origin discrimination, which confirm the legal merit of plaintiffs-appellants' statutory claims, and (ii) the consequences of suspending all entry from certain majority-Muslim countries, which compel the conclusions that the challenged Executive action serves no valid policy objective and that no irreparable harm would result from denying a stay and affirming the injunction order.

SUMMARY OF ARGUMENT

In an unprecedented proclamation, President Donald J. Trump has declared that admitting into the United States any national of one of six Muslim-majority countries would be "detrimental to the interests of the United States." Exec. Order No. 13,780, § 2(c), 82 Fed. Reg. 13,209 (Mar. 6, 2017) (the "Order"). As justification, the Order does not identify any specific threat based on intelligence, nor does it isolate any particular weaknesses in vetting procedures that would support a blunderbuss ban against the entire populations of these six nations. Instead, the Order paints all nationals of six countries with the same broad brush, citing "conditions" in those countries "that demonstrate why their nationals continue to present heightened risks" to national security. Order § 1(e). By doing so, the Order impermissibly engages in textbook national-origin discrimination and makes our nation less secure.

The Government does not deny that the Order is discriminatory. Its defense of the Order rests on two propositions: that the President is authorized by statute to discriminate against aliens on the basis of national origin, and that the Order serves important national security objectives. Neither proposition is correct. The Order ignores the lessons of history, the mandates of Congress, and the wisdom of sound national security policy. The Government's motion to stay the district court's order should be denied, and the district court's order should be affirmed.

ARGUMENT

I. Congress Has Sought To Eradicate National-Origin Discrimination From U.S. Immigration Laws.

A. National-Origin Discrimination Began As A Means Of Maintaining The "Racial Status Quo."

"During most of its history, the United States openly discriminated against individuals on the basis of race and national origin in its immigration laws." *Olsen v. Albright*, 990 F. Supp. 31, 37 (D.D.C. 1997). The first U.S. law significantly restricting immigration was the Chinese Exclusion Act of 1882, which suspended entry of "Chinese laborers" into the United States and barred any court from "admit[ting] Chinese to citizenship" based on fears that "the coming of Chinese laborers to this country endangers the good order[.]" Act of May 6, 1882, ch. 126, 22 Stat. 58. Further nationality-based immigration restrictions were imposed by the Immigration Act of 1917, which barred admission by anyone born in what would become known as the Asiatic Barred Zone (broadly consisting of most countries on the Asian continent). Pub. L. No. 64-301, 39 Stat. 874.

The early 20th Century restrictions on entry were part of a permanent, comprehensive "national origins quota system[.]" Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and*

Nationality Act of 1965, 75 N.C. L. REV. 273, 279 (1996). The "first permanent quota law" was the Immigration Act of 1924. *Id.* & n.18 (citing Pub. L. No. 68-139, 43 Stat. 153). That law's purpose was "to preserve, as nearly as possible, the racial status quo in the United States" and "to guarantee … racial homogeneity[.]" H.R. Rep. No. 68-350, pt. 1, at 13–14, 16 (1924). The 1924 Act capped the number of visas that could issue to "quota immigrants" at 150,000 annually and apportioned those visas based on "the number of inhabitants in continental United States in 1920 having that national origin[.]" 1924 Act § 11(b). Its "numerical restrictions" caused "the closing of the immigration door and the favoring of West Europeans over Italians, Jews, Asians and others[.]" *Mojica v. Reno*, 970 F. Supp. 130, 145 (E.D.N.Y. 1997) (Weinstein, J.) (referring to the 1924 Act and others as "[p]erhaps the country's most marked xenophobic paroxysm").

B. Congress Removed Nationality-Based Immigration Restrictions To Advance U.S. Foreign Policy Interests During And Following World War II.

Congress began to roll back nationality-based immigration restrictions starting in 1943, when Congress awarded China a minimum immigration quota and allowed Chinese nationals to become U.S. citizens. Act of Dec. 17, 1943, Pub. L. No. 78-199, 57 Stat. 600. President Roosevelt, the State Department, and Members of Congress noted that these reforms served to strengthen the United States' relationship with China—a key ally during World War II—while countering

Japan's anti-American propaganda campaign, which highlighted the United States' restrictionist immigration policies as evidence of its hostility to East Asian countries. Chin, *supra*, at 282–86 & nn.36–47.

Close to a decade later, Congress enacted the Immigration and Nationality Act of 1952, which repealed the Asiatic Barred Zone, gave minimum quotas to all Asian nations, and eliminated racial bars on U.S. citizenship. Pub. L. No. 82-414, 66 Stat. 163. The law's proponents "relied almost exclusively on the foreign policy benefit of reducing racial restrictions against Asians" as the United States sought to isolate the Soviet Union during the early years of the Cold War. *See* Chin, *supra*, at 287. The House Judiciary Committee's Report explained that the legislation would "have a favorable effect on our international relations, particularly in the Far East" where "American exclusion policy ha[d] long been resented[.]" H.R. Rep. No. 82-1365, at 28–29, *reprinted in* 1952 U.S.C.C.A.N. 1653.

C. In 1965, Congress Prohibited National-Origin Discrimination.

Congress abolished the national quota system in 1965. *See* Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended at 8 U.S.C. §§ 1101 *et seq.*). One of the 1965 Act's central mandates, still operative today, is that absent some narrow exceptions, "No person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of … race, sex, ***nationality, place of birth, or place of residence***[.]" *Id.* § 2 (emphasis added; codified as amended at 8 U.S.C. § 1152(a)(1)(A)).

The 1965 Act was motivated by Congress' determination that nationality-based "restrictionism was out of place for a nation which aspired to moral and political leadership in the world." *Mojica*, 970 F. Supp. at 145 (citation omitted). As Congress recognized when liberalizing immigration from Asian countries in 1952, the national quota system frustrated the United States' efforts to ally with other nations against the Soviet Union. Chin, *supra*, at 298 & n.105; *Mojica*, 970 F. Supp. at 145. The 1965 Act replaced nation-specific quotas with uniform limits and prioritized applicants based on their own particular skills and ties to U.S. citizens. *See* 1965 Act § 3 (codified as amended at 8 U.S.C. § 1153). These reforms furthered two congressional aims: that "favoritism based on nationality will disappear[,]" and that "[f]avoritism based on individual worth and qualifications will take its place." 111 Cong. Rec. 24,226 (1965) (Sen. Edward Kennedy); *accord* S. Rep. No. 89-748, *reprinted in* 1965 U.S.C.C.A.N. 3328, 3332 ("emphasis should be placed on the quality of the immigrants to be admitted, rather than on the number").

II. The Order Discriminates Based On National Origin In Violation Of The Immigration And Nationality Act.

The Government's defense of the Order relies upon an expansive reading of the President's authority under 8 U.S.C. § 1182(f) to "suspend the entry of all aliens or any class of aliens" if the President "finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States[.]" Brief for Appellants ("Br.") at 28–29. That statutory provision, however, does not grant the President the power to engage in national-origin discrimination.

A. The Order Violates § 1152(a)'s Prohibition On National-Origin Discrimination, Notwithstanding § 1182(f).

The district court correctly concluded that § 1182(f), despite purporting to allow suspending entry of "any" aliens or class thereof, does not grant the President authority to violate the more specific and later enacted § 1152(a) by discriminating on the basis of national origin. J.A. 790–92.

The Government does not dispute that § 1152(a)(1)(A) prohibits discrimination based on national origin in the issuance of immigrant visas—instead, it attempts to sidestep § 1152(a) by arguing that the Order involves discrimination in entry, not in "the issuance of an immigrant visa." Br. at 32–33. This argument is wrong for two reasons.

First, the Order is designed to result in national-origin discrimination in visa issuance because the Order exempts current holders of valid visas, while individuals who have no valid visa are already inadmissible under 8 U.S.C. § 1182(a)(7). Thus, as the district court properly recognized, suspending entry on the basis of nationality "would have the specific effect of halting the issuance of visas" on that basis, thereby violating § 1152(a)(1)(A). J.A. 790.

Second, the Government's reading of § 1152(a) would nullify the statute, as the President could avoid § 1152(a)'s prohibitions on discrimination simply by issuing visas to the classes sought to be discriminated against, and then denying them admission when they present their visas at ports of entry. Congress could not plausibly have intended to permit the Executive to circumvent § 1152(a) so easily. Section 1152(a)(1)(A) is best read to prohibit discrimination throughout the visa process, which must include the decision whether to admit a visa holder upon presenting the visa.

The Government's invocation of the Secretary of State's authority "to determine the procedures for the processing of immigrant visa applications" under 8 U.S.C. § 1152(a)(1)(B), Br. at 33–34, is unavailing for much the same reason. If the Government were correct, the Secretary of State could rely on § 1152(a)(1)(B) to discriminate as the Order does, then the Executive Branch could render § 1152(a)(1)(A)'s prohibition on national-origin discrimination a nullity. It would be senseless to conclude that Congress intended such an easy end-run around its non-discrimination mandate. Nor would it make sense to read § 1152(a)(1)(B)'s authorization to "determine the procedures for the processing of visa applications" as a grant of power to enact a sweeping nationality-based ban on entry, which cannot be considered a mere "procedure" for "processing" without making the § 1152(a)(1)(B) authority limitless. In any event, as the district court reasoned, § 1152(a)(1)(B)'s clarification of the authority of the Secretary of State "does not provide a basis to uphold an otherwise discriminatory action by the *President* in an Executive Order" and "does not include within the exception any authority to make *temporal* adjustments" as the Order seeks to do. J.A. 792 (emphasis added).

Faced with § 1152(a)'s clear prohibition on national-origin discrimination, the Government invokes § 1182(f) and § 1185(a), and argues that the President may suspend entry for any reason, even if doing so would violate § 1152(a)(1)(A). Br. at 28–30. That reading cannot be correct. Nothing in § 1182(f) or § 1185(a) indicates that the President may ignore non-discrimination mandates when deciding whether entry of a particular class of immigrants or non-immigrants would be "detrimental." To the contrary, Congress omitted § 1182(f) from the list of enumerated exceptions to § 1152(a), which "provides strong evidence that Congress did not intend for 1182(f) to be exempt from the anti-discrimination provision of § 1152(a)." J.A. 791. And if § 1182(f) were read as the Government urges, then the President could impliedly repeal § 1152(a)—in whole or in part—by determining that national-origin discrimination is in the United States' interest as to certain origin countries. The only means by which to give effect to both § 1152(a) and § 1182(f) is to conclude that the President's power under § 1182(f) to "suspend the entry" of certain aliens does not include the power to act contrary to the prohibition of national-origin discrimination in § 1152(a).

B. Section 1182(f) Does Not Justify Frustrating Congress' Prescriptions And Defying Established Non-Discrimination Principles.

The President cannot invoke § 1182(f) to discriminate against immigrants based on national origin; § 1152(a)(1)(A) plainly forbids it, as discussed above. But § 1182(f) cannot justify the Order's discrimination against non-immigrants either. Other provisions of the Immigration and Nationality Act ("INA"), as well as its overall design and structure, preclude the exercise of § 1182(f) authority to engage in national-origin discrimination—including against non-immigrants such as students, tourists, and guest workers.

Section 1182(f) does not, as the Government suggests, grant the President freewheeling discretion to exclude any noncitizen from the United States, for any length of time, and for any reason. The § 1182(f) authority is limited, and the Order runs afoul of those limits in several ways.

1. The President Cannot Override Congress' Solution To The Order's Purported Concerns.

The Order suspends the entry of all nationals from six countries as a means "to protect the Nation from terrorist activities by foreign nationals admitted to the United States[.]" Order, preamble. The Order ignores, however, that Congress has directed the Executive Branch to address the risk of such activities in other ways.

The Order's blanket national-origin based suspension impermissibly frustrates Congress' directive.

First, § 1182(a)(3)(B) bars admission by anyone who has "engaged in a terrorist activity," is "likely to engage after entry in any terrorist activity," is a "member of a terrorist organization," has "received military-type training … from or on behalf of any" terrorist organization, or has "incited" or who "endorses or espouses" or "persuades others to endorse or espouse" "terrorist activity" or to "support a terrorist organization[.]" 8 U.S.C. § 1182(a)(3)(B)(i). This statute directs the Executive Branch to decide—on an *individualized* basis—whether any person seeking admission is likely to engage in terrorist activities, or has any history of committing or supporting terrorism. *See Kerry v. Din*, 135 S. Ct. 2128, 2140–41 (2015) (Kennedy, J., concurring) ("§ 1182(a)(3)(B) specifies discrete factual predicates the consular officer must find to exist" and requires "at least a facial connection to terrorist activity").

Second, in 2015, Congress considered the precise problem that the Order purports to address—whether nationals from certain countries present higher risks of engaging in terrorist attacks if admitted—and rejected the supposition that denying entry based on national origin was the appropriate method by which to address those risks. After debate, Congress enacted 8 U.S.C. § 1187(a)(12), which restricted Iraqi and Syrian nationals' access to the tourist visa waiver program and provided a mechanism to review regularly whether other nationality-based classes should be excluded from that program. Congress determined that the policy enshrined in § 1187(a)(12), rather than an outright ban on entry from Iraqi and Syrian nationals, was the appropriate response to the security risks targeted by the Order, and it legislated accordingly.

The statutes described above represent Congress' considered view on the same security issues that the Order purports to address. No changed circumstances since their enactment would justify the President's attempt to substitute his rules for those that Congress has chosen. Nevertheless, the Order purports to override Congress' considered judgment.

It is senseless to interpret the INA, as the Government does, to contain the seeds of its own repeal at the pleasure of the President. Section 1182(f) must be read in light of the accompanying provisions of the INA, which collectively make clear that § 1182(f) cannot sensibly be interpreted to provide the President with unlimited powers to exclude any class of aliens, at any time, for any reason. Instead, it is more accurately read as a broad but limited grant of authority to confront challenges that Congress has not yet addressed by excluding classes of aliens "*not* covered by one of the categories in section 1182(a)." *Abourezk v. Reagan*, 785 F.2d 1043, 1049 n.2 (D.C. Cir. 1986) (emphasis added). Section 1182(f) allows the President to *fill gaps* in the INA's exclusion provisions where he deems appropriate. But it does not, as the Government urges, confer discretion to rewrite the substantive limitations on Executive authority expressly contained within the INA, including its prohibition on national-origin discrimination.

2. Congress' Express Prohibition On National-Origin Discrimination Has Been Enforced By Courts And Respected By The Executive Branch, Even As To Non-Immigrants.

The Judicial and Executive Branches have long understood § 1152(a) to articulate a non-discrimination principle that suffuses the entirety of the INA, which would reach § 1182(f) even as-applied to non-immigrant aliens. *See Legal Assistance for Vietnamese Asylum Seekers v. U.S. Dep't of State, Bureau of Consular Affairs*, 45 F.3d 469, 473 (D.C. Cir. 1995) ("*LAVAS*") (concluding that "the agency's nationality-based regulation runs athwart" of "a statute flatly forbidding nationality-based discrimination" by which "Congress has ***unambiguously*** directed that ***no nationality-based discrimination shall occur***") (emphasis added), *vacated on other grounds*, 519 U.S. 1 (1996).

In *Bertrand v. Sava*, the Second Circuit recognized that the Attorney General, in exercising discretion under 8 U.S.C. § 1182(d)(5) whether to parole certain asylum applicants pending the outcome of exclusion hearings, cannot "discriminate invidiously against a particular race or group[.]" 684 F.2d 204, 212 (2d Cir. 1982). The court explained that "[i]nvidious discrimination against a particular race or group by a public official is a type of irrational conduct generally not countenanced by our law; such discrimination ordinarily is inconsistent with a 'facially legitimate and bona fide reason' for government action." *Id.* at 213 n.12.[2] Similarly in *Haitian Refugee Center v. Civiletti*, the court noted that § 1152(a)'s prohibition on national-origin discrimination "manifested Congressional recognition that the maturing attitudes of our nation made discrimination on these bases improper[,]" compelling the conclusion that "INS has no authority to discriminate on the basis of national origin or race" against the asylum seekers in that case. 503 F. Supp. 442, 453 (S.D. Fla. 1980).[3] And in *Olsen v. Albright*, the Government did "not contend that the Consulate is permitted to engage in discrimination on the basis of race, ethnicity, or nationality" in the issuance of "nonimmigrant visas." 990 F. Supp. at 33, 37.[4]

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[2] Even if *Congress* could "employ race or national origin as criteria in determining which aliens to exclude from the country[,]" that authority "would not permit an immigration official, in the absence of such policies, to apply neutral regulations to discriminate on (the basis of race and national origin)." *Bertrand*, 684 F.2d at 213 n.12 (citations and quotation marks omitted).

[3] While the court in *Haitian Refugee Center* acknowledged the possibility that the INS might have such authority "perhaps by promulgating regulations in a time of national emergency," the case cited by the court for this proposition, *Narenji v. Civiletti*, 617 F.2d 745 (D.C. Cir. 1979), merely upheld a regulation requiring Iranian students to provide certain information to the INS during the hostage crisis. 503 F. Supp. at 453 n.13.

[4] It is of no moment that these cases concerned Executive officials other than the President. National-origin discrimination does not become more rational simply by virtue of the President's endorsement of it.

The principle that the Executive Branch cannot rely upon national-origin discrimination in making admission decisions is so entrenched that, in the half-century since the passage of the 1965 Act, notwithstanding numerous national security crises including the attacks of September 11, 2001, the Executive has respected the rule in all but one *sui generis* case. With respect to the rare occasions in which § 1182(f) has been invoked, nearly all involved suspending entry based on criteria other than national origin, such as affiliation as a foreign government agent or prior harmful conduct involving human rights abuses or impeding peace or democracy—in effect, to deny entry as a sanction designed to respond to specific and sanctionable conduct.[5]

To amici's knowledge, § 1182(f) has been expressly invoked to justify suspending entry based solely on national origin *only once* in our nation's history. Even then, the nationality-based distinctions were not discriminatory because they were deployed as foreign policy countermeasures against a nation that had disrupted migration to and from the United States, and not as a crude guesstimate of any individual's perceived dangerousness.

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[5] *See* Kate M. Manuel, *Executive Authority to Exclude Aliens: In Brief* at 6–10 tbl.1, CONG. RESEARCH SERV. (Jan. 23, 2017) (collecting proclamations invoking § 1182(f)).

President Reagan's August 22, 1986 proclamation suspending entry by Cuban nationals was a plain act of retaliation against the Cuban government for its decision to repudiate a bilateral diplomatic agreement with the United States that had normalized immigration procedures. By its terms, the proclamation was a direct reaction to Cuba's decision "to suspend all types of procedures regarding … the December 14, 1984 immigration agreement between the United States and Cuba" as well as to Cuba's "failure … to resume normal migration procedures with the United States[.]" Proc. No. 5517, 51 Fed. Reg. 30,470 (Aug. 22, 1986). It provided for the suspension to be lifted when the Cuban government complied with the agreement allowing normal immigration procedures to be resumed.

Unlike President Reagan, President Trump has not claimed that his Order is aimed at responding to the acts of the foreign sovereigns, or pressuring foreign governments to accede to U.S. foreign policy demands. Nor does his Order, in contrast to the Reagan order, indicate that it may no longer be effective if a foreign sovereign meets certain conditions (*i.e.*, resuming normal migration procedures).

Perhaps most importantly, President Reagan's order made no claims about the inherent characteristics—whether dangerousness or otherwise—of the individual applicants affected by the exercise of the President's suspension authority. Here, the Order uses nationality as a proxy for perceived individual dangerousness—it assumes that because an individual is a citizen of a covered nation, he is inherently more dangerous than a citizen of a non-covered nation. That assumption—the branding of an individual based *solely* upon perceived traits of the biological, ethnic, national, or religious group to which that individual belongs—is the essence of discrimination under our Constitution. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 741–43 (2007) (plurality op. of Roberts, C.J.). It is a rationale that, unlike the Reagan order, goes to the heart of the prohibition against national-origin discrimination found in the INA. *See LAVAS*, 45 F.3d at 473.

The Government's assertion that the preliminary injunction is "extraordinary," Br. at 1, to the extent that it is accurate, ignores that the enjoined Order itself is extraordinary. Indeed, the Order is unprecedented. None of the Executive actions cited by the Government,[6] nor any others known to amici,[7] invoked § 1182(f) to suspend entry from one or more countries based on the assumption that nationals from those countries were inherently dangerous. In sum, entrenched historical practice by the Executive Branch, confirmed by legislative actions and judicial decisions, amply demonstrates that the authority granted by § 1182(f) has never been understood to authorize national-origin discrimination.

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[6] *See* Br. at 29 n.10 (citing proclamations and orders that, other than President Reagan's 1986 proclamation regarding Cuba discussed above, did not make purely nationality-based distinctions).

[7] Amici note two other Executive actions in the interest of completeness and to underscore the extraordinary character of the present Order. First, President Reagan's 1981 proclamation directed at attempted undocumented entry from the high seas did not facially impose nationality-based restrictions, nor did it bar anyone that otherwise would have been admissible. *See* Proc. No. 4865, 46 Fed. Reg. 48,107 (Sept. 29, 1981); *accord* Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (May 24, 1992) (merely implementing this interdiction policy). Second, President Carter's announcement during the hostage crisis concerning "visas issued to Iranian citizens for future entry" was—like President Reagan's 1986 proclamation regarding Cuba—incident to a significant foreign-policy shift vis-à-vis a foreign

III. National-Origin Discrimination Is Ineffective And Fails To Protect The Homeland From Foreign Terrorist Plots.

Amici, drawing upon years of experience enforcing U.S. immigration laws, respectfully disagree with the notion that the Order "is expressly premised on a facially legitimate, bona fide purpose: protecting national security." Br. at 37. The Government expressly relies upon this representation as the basis for its assertion of irreparable harm. *See* Motion of Defendants-Appellants for a Stay Pending Expedited Appeal ("Stay Mot.") at 2–10. But the Government's emphasis on attenuated and abstract effects on executive authority, rather than concrete risks of terrorist attacks in the United States, reveals the flimsiness of the Order's purported national security objectives.

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government; it did not invoke § 1182(f), and it was only one of many sanctions proposed in order to increase political pressure on the Iranian government to ensure the return of the hostages to the United States. *Sanctions Against Iran Remarks Announcing U.S. Actions* (Apr. 7, 1980), *available at* http://www.presidency.ucsb.edu/ws/?pid=33233%20.

Separately, the Order undermines the very purposes it purports to serve. Contrary to the Order's stated policy—"to improve the screening and vetting protocols and procedures associated with the visa-issuance process and the USRAP," Order § 1(a)—the Order weakens vetting protocols and procedures by using national-origin discrimination as a substitute for individualized threat assessments. The Order also threatens to fracture critical military, intelligence, and counterterrorism partnerships and hinder cooperation with the very communities with which law enforcement professionals work to disrupt terrorist plots.

A. National Origin Is Not A Proxy For Security Risk And Cannot Substitute For Individualized Threat Assessments.

Section 1152(a)'s longstanding prohibition on national-origin discrimination in immigrant visa decisions embodies a bipartisan consensus that such discrimination is incompatible with American values and undermines our ability to guard against real-world security threats. The Order imposes a presumptive bar on entry by *all* individuals from six Muslim-majority nations purportedly because of "the significant presence in each of these countries of terrorist organizations," among other supposed risks. Order § 1(d). But as non-partisan and bipartisan security professionals have recognized for many years, such gross generalizations are a poor substitute for the targeted and individualized assessments required to effectively address the threat of terrorism.

In amici's experience, national origin is an exceedingly poor proxy for security risk. Nationals from the six countries identified in the Order have killed *no* Americans in terrorist attacks on U.S. soil between 1975 and 2015. Alex Nowrasteh, *Little National Security Benefit to Trump's Executive Order on Immigration*, CATO AT LIBERTY (Jan. 25, 2017).[8] Indeed, only *six percent* of culpable individuals involved in terrorist plots directed at U.S. soil had family backgrounds in the six targeted nations (plus Iraq). Charles Kurzman, *Muslim-American Involvement with Violent Extremism* at 2 (Jan. 26, 2017).[9]

At the same time that it swings at the wrong target, the Order makes no effort to address the threats that actually exist—namely, the threats from U.S. citizens and foreign nationals from visa-waiver countries. FBI Director James B. Comey has testified about the danger posed by American citizens who are "traveling overseas … and radicalizing there, and then coming home. And they are traveling from all over the United States to all parts of the world." Oversight of the Federal Bureau of Investigation Before the H. Comm. on the Judiciary, 113th

[8] *Available at* https://www.cato.org/blog/little-national-security-benefit-trumps-executive-order-immigration.

[9] *Available at* https://sites.duke.edu/tcths/files/2017/01/FINAL_Kurzman_Muslim-American_Involvement_in_Violent_Extremism_2016.pdf.

Cong. at 2 (2014) (statement of James B. Comey).[10] Moreover, Director Comey testified, "homegrown violent extremists" are of "particular concern" and "do not share a typical profile." *Id.* The 2016 Worldwide Threat Assessment of the U.S. Intelligence Community characterized "US-based HVEs [homegrown violent extremists]" as "the most significant Sunni terrorist threat to the US homeland in 2016." Worldwide Threats Before the S. Armed Servs. Comm., 114th Cong. at 4 (2016) (statement of James R. Clapper, Jr.).[11]

Importantly, "the greatest threat" emanating from abroad are "people coming from visa waiver countries," such as the United Kingdom, Germany, and France. Interview with Michael Leiter, PBS (Jan. 31, 2017).[12] Over 36,500 foreign fighters originating from over 100 countries, including at least 6,600 from Western nations, have traveled to Syria since the civil war began. Clapper, *supra*, at 5. For all of these reasons, the Order's crude discriminatory method will inevitably be less effective at preventing terror attacks than individualized threat assessments.

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[10] *Available at* https://judiciary.house.gov/wp-content/uploads/2016/02/DOJ-Testimony-FBI-Comey-HJC-Oversight-June-11-2014.pdf.

[11] *Available at* https://www.dni.gov/files/documents/SASC_Unclassified_2016_ATA_SFR_FINAL.pdf.

[12] *Available at* http://www.pbs.org/newshour/bb/immigration-ban-misses-greatest-threat-counterterrorism-expert-says/.

B. Individualized Vetting Is A Superior Means Of Assessing Security Risk In Immigration Decisions.

The Order cannot be justified on the basis that individualized vetting is inherently inadequate to protect the nation. The vetting process for refugees from the Middle East is exhaustive. As one former DHS immigration officer has explained:

> By the time Homeland Security steps in to conduct an interview, the officer has a stack of biographical information on the refugee. … I typically had to review a raft of high school degrees, baptismal certificates, marriage and birth certificates, honors and awards, photos with U.S. service personnel, recommendations from American military members, and conscription booklets or cards. … The Homeland Security officer then conducts a detailed review. Every word is recorded so it can be matched up with other documentation and past interviews. … The refugees' information and fingerprints (also taken by Homeland Security officers) are run through the databases of nine law enforcement, intelligence and security agencies and matched against criminal databases and biographical information such as past visa applications. Behind the scenes, officers and supervisors of varying political stripes debate and discuss each case endlessly. At U.S. Citizenship and Immigration Services headquarters, officers conduct more research, reconciling multiple interview notes, country conditions, and background checks. They are trained to spot "red flags" or issues that might make someone inadmissible.

Natasha Hall, *Refugees Are Already Vigorously Vetted*, WASH. POST (Feb. 1, 2017);[13] *see also* Haeyoun Park & Larry Buchanan, *Refugees Entering the U.S. Already Face A Rigorous Vetting Process*, N.Y. TIMES (Jan. 29, 2017) (listing the detailed steps a refugee must undertake before entry into the United States).[14]

Moreover, several of the INA's provisions are already aimed at the threat that the Order purports to address. By prohibiting national-origin discrimination in § 1152(a) while requiring exclusion of aliens on individualized terrorism-related grounds in § 1182(a)(3)(B) and exempting those present in certain countries of concern from the visa waiver program in § 1187(a)(12), the immigration laws reflect Congress's judgment, as well as the consensus of security experts that national-origin discrimination cannot effectively address the type of threats identified by the Order. *See, e.g.*, Decl. of Albright *et al.*, *Aziz v. Trump*, No. 1:17cv116 (E.D. Va. Feb. 8, 2017) (ECF No. 57).

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[13] *Available at* https://www.washingtonpost.com/posteverything/wp/2017/02/01/refugees-are-already-vigorously-vetted-i-know-because-i-vetted-them/.

[14] *Available at* https://www.nytimes.com/interactive/2017/01/29/us/refugee-vetting-process.html.

C. The Order's National-Origin Discrimination Disrupts Vital Relationships Between The United States And Military, Intelligence, And Counterterrorism Partners.

American troops and intelligence officers rely upon individuals in the targeted countries and other Muslim-majority nations across the world to provide military assistance and intelligence information in the fight against terrorism. The Order undermines goodwill with these key partners, who risk their lives to keep Americans safe, and in turn places our own national security efforts at risk. Indeed, the Government recognized this very concern when it was obliged to revise the Order to exclude Iraq, after Iraqi military leaders made clear that the original order was an insult and undermined their ability to cooperate effectively with American forces. *See, e.g.*, David Zucchino, *Travel Ban Drives Wedge Between Iraqi Soldiers and Americans*, N.Y. TIMES (Feb. 3, 2017).[15]

More generally, the Order disrupts international partnerships on which the United States relies for actionable information rendered through intelligence, law enforcement, military, and diplomatic channels—information needed to address real and imminent terrorist threats. The Order's predecessor caused international outrage and strained important U.S. relationships with countries in Europe and the Middle East. Alienating these partners risks disrupting the United States' access to

[15] *Available at* https://www.nytimes.com/2017/02/03/world/asia/travel-ban-drives-wedge-between-iraqi-soldiers-and-americans.html.

the intelligence resources necessary to foil foreign plotters who target U.S. soil. *See, e.g.*, Loveday Morris, *Iraqi Leader to US: Americans Come to Iraq to Fight With ISIS, but I Haven't Banned You*, WASH. POST (Jan. 31, 2017);[16] Kevin Liptak, *Travel Ban Remains Sticking Point in Trump Calls with US Allies*, CNN (Feb. 9, 2017).[17] The Order also alienates international Muslim communities at a time when we "badly need[] Muslim partners to help [us] track down and neutralize those who pose a threat to America and its allies." Whitney Kassel, *Trump's First Casualty Is U.S. Counterterrorism*, FOREIGN POLICY (Feb. 3, 2017).[18]

D. National-Origin Discrimination Undermines U.S. Relationships With Muslim-American Communities, Whose Cooperation Is Vital In Helping Prevent Domestic Terrorism.

Strong partnerships between law enforcement and the Muslim-American community are essential to thwarting potential terrorist activity. Tips from Muslim-Americans have helped law enforcement identify at least fifty-four terrorism suspects since 2001. Charles Kurzman, *Muslim-American Terrorism in 2013* at 4

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[16] *Available at* https://www.washingtonpost.com/world/middle_east/iraqi-leader-to-us-americans-come-to-iraq-to-fight-with-isis-but-i-havent-banned-you/2017/01/31/c74d8552-e72a-11e6-903d-9b11ed7d8d2a_story.html.

[17] *Available at* http://www.cnn.com/2017/02/09/politics/donald-trump-calls-world-leaders/.

[18] *Available at* http://foreignpolicy.com/2017/02/03/trump-has-deeply-undermined-u-s-counterterrorism-operations-navy-seal-team-6-yemen/.

(Feb. 5, 2014).[19] Further, "more than one-fifth of the post-9/11 Islamist terrorism cases originated with tips from Muslim community members or involved the cooperation of the families of alleged plotters." Peter Bergen & Andrew Lebovich, *Analysis: 1 in 5 Terror Cases Started with Tips from Muslims*, CNN (Mar. 10, 2011).[20] Because of its disparately harsh impact on Muslim travelers, the Order threatens to undermine the Muslim community's relationship with U.S. law enforcement—which to date has been strengthened through years of effort—by singling out Muslims for discriminatory treatment.

The Order sends a dangerous message to Muslims all over the world, including Muslim-Americans: that the U.S. government is suspicious of their religion.[21] That message risks undermining trust between the American Muslim community and law enforcement, as law enforcement depends on American Muslims' willingness to report suspicious activity and to work with law enforcement on counter-radicalization and counterterrorism efforts. *See* Josh Sanburn, *President Trump's Immigration Order Could Harm the Fight Against Domestic Terror Some Experts Warn*, TIME (Jan. 31, 2017) ("the relationship between Muslim-American communities and police . . . depend[s] heavily on the perception of fairness");[22] Stephen J. Schulhofer *et al.*, *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335 (2013) (finding Muslim community's willingness to cooperate rose with perception of fairness of government policy); Julia Edwards Ainsley *et al.*, *Exclusive: Trump to focus counter-extremism program solely on Islam – sources*, REUTERS (Feb. 2, 2017) (noting that recipients of counterterrorism-related grants offered by DHS's Office of Community Partnerships have announced their intention not to accept the funds after "Countering Violent Extremism" was renamed to "Countering Radical Islamic Extremism").[23] The United States cannot afford to alienate its partners in the fight against domestic terrorism.

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[19] *Available at* https://sites.duke.edu/tcths/files/2013/06/Kurzman_Muslim-American_Terrorism_in_2013.pdf.

[20] *Available at* http://www.cnn.com/2011/POLITICS/03/09/bergen.king.hearing/.

[21] Muslim refugees from the listed countries made up 82.2% of all Muslim refugee arrivals to the United States from January 1, 2016 to February 11, 2017. Refugee Processing Center, *Interactive Reporting – Admissions and Arrivals, at* http://ireports.wrapsnet.org/Interactive-Reporting/EnumType/Report?ItemPath=/rpt_WebArrivalsReports/MX%20-%20Arrivals%20by%20Nationality%20and%20Religion.

[22] *Available at* http://time.com/4655229/president-trump-immigration-executive-order-muslims-terrorism-police/.

[23] *Available at* http://www.reuters.com/article/us-usa-trump-extremists-program-exclusiv-idUSKBN15G5VO.

E. National-Origin Discrimination Is Contrary To American Values.

National-origin discrimination by definition sweeps broadly without any regard for particular circumstances, and therefore precludes an individualized, data-driven immigration policy. Grounding our immigration policy on so poor a foundation will "result in, or at least impose a high risk of, inquiries and categories dependent upon demeaning stereotypes, classifications of questionable constitutionality on their own terms." *Schuette v. BAMN*, 134 S. Ct. 1623, 1635 (2014) (plurality op. of Kennedy, J.); *accord Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017) (majority op. of Kennedy, J.) (impeaching a jury verdict infected with racial bias and stating that "[i]t must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons"); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) ("[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.") (footnote calls omitted). The Order's message—that *all persons* hailing from the six targeted nations are presumptive terrorist threats—jettisons the sensible threat-centered approach that has long driven immigration policy and harkens back to a the shameful period of our nation's history when individuals were punished simply because of their national heritage and race. *See Korematsu v. United States*, 323 U.S. 214 (1944).

CONCLUSION

The preliminary-injunction order of the district court should be affirmed, and the Government's motion to stay the district court's order should be denied.

Respectfully submitted,

Dated: April 19, 2017

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) as the brief contains 6,321 words, excluding those parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ Michael J. Gottlieb

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Fourth Circuit through the CM/ECF system on April 19, 2017, which will automatically serve all parties.

Dated: April 19, 2017

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